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McNulty Plastering, Inc. and Local 9, Bricklayers and Allied Craftworkers, AFL-CIO and Local 67, Operative Plasterers & Cement Masons International Union, AFL-CIO, Party in Interest. Case 7-CA-47571

May 12, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

The General Counsel seeks summary judgment in this case pursuant to the terms of a settlement agreement. On June 9 and July 29, 2004, respectively, Local 9, Bricklayers and Allied Craftworkers, AFL-CIO (Bricklayers Local 9) filed a charge and an amended charge against the Respondent. Subsequently, the Respondent and Bricklayers Local 9 entered into a settlement agreement, which was approved by the Regional Director for Region 7 on August 31, 2004. The settlement agreement required the Respondent to, among other things, (1) make whole Isidoro Apreza, John Heath, Jeffrey Jackson, Jesse Jackson, Roger Lawrence, and Dennis Young by paying the amounts set forth in the settlement agreement; and (2) post a notice to employees.

The settlement agreement also contained the following provision:

Noncompliance With Settlement Agreement—The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, including but not limited to, failure to make timely installment payments of moneys, and after 15 days notice from the Regional Director for the National Labor Relations Board of such non-compliance without remedy by Charged Party, the Regional Director shall issue complaint in the instant case. Thereafter, the General Counsel may file a motion for summary judgment with the Board on the allegations of the just issued complaint concerning the violations alleged therein. The Charged Party understands and agrees that the allegations of the aforementioned complaint may be deemed to be true by the Board, that it will not contest the validity of any such allegations, and the Board may enter findings, conclusions of law, and an order on the allegations of the aforementioned complaint. On receipt of said motion for summary judgment the Board shall issue an Order requiring the Charged Party to Show Cause why said motion of the General Counsel should not be granted. The only issue that may be raised in response to the Board's Order to Show Cause is whether Charged Party defaulted upon the terms of this Settlement Agreement. The Board

may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party, on all issues raised by the pleadings. The Board may then issue an Order providing full remedy for the violations found as is customary to remedy such violations, including but not limited to the provisions of this Settlement Agreement. The parties further agree that the Board Order and a U.S. Court of Appeals Judgment may be entered hereon ex parte.

By letter dated September 21, 2004, the Regional Director provided the Respondent with a conformed copy of the settlement agreement and copies of the notice to employees for posting, including instructions for posting. The Regional Director's letter also requested that the Respondent return to Region 7 three signed and dated copies of the Notice to Employees, and that it send to the Region checks made out to the six employees for the amounts owed to them under the settlement agreement. The Respondent did not respond to this letter.

By letter dated October 28, 2004, counsel for the General Counsel requested the Respondent to cure its non-compliance with the settlement agreement no later than November 8, 2004, by providing the Region with copies of the signed and dated notice to employees and the checks for the amounts due the employees. This letter reminded the Respondent that failure to comply with the settlement agreement could lead the Region to file a motion for summary judgment. The Respondent failed to comply. On November 18, 2004, the Regional Director sent the Respondent a 15-day notice letter, pursuant to the settlement agreement, stating that unless the Respondent complied with the settlement agreement by December 3, 2004, the Region would issue a complaint and file a motion for summary judgment. The Respondent failed to respond to the 15-day notice letter.

Accordingly, pursuant to the terms of the noncompliance provision of the settlement agreement, on January 4, 2005, the Regional Director issued a complaint against the Respondent, alleging that it has violated Section 8(a)(1), (2), and (3) of the Act.

On January 27, 2005, the General Counsel filed a Motion for Summary Judgment with the Board. On February 1, 2005, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent did not file a response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Summary Judgment

According to the uncontroverted allegations in the General Counsel's motion, the Respondent has failed to comply with the settlement agreement by failing to remit the agreed-upon amounts due employees and failing to post the notice to employees. Consequently, pursuant to

the noncompliance provisions of the settlement agreement set forth above, we find that all of the allegations of the complaint are true.

Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with its headquarters at 1236 East County Road, 300 N, North Vernon, Indiana, has been engaged in the performance of commercial plastering and related construction work.

Based on a projection of its operations since about May 6, 2004, at which time the Respondent commenced its operations, the Respondent, in conducting its business operations described above, will annually derive gross revenues in excess of \$50,000 from work in states other than the State of Indiana.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Bricklayers Local 9 and Local 67, Operative Plasterers and Cement Masons International Union, AFL-CIO (Plasterers Local 67) are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

James McNulty	Co-owner
Shane McNulty	Co-owner
Russ Clapham	Superintendent

On about May 27, 2004, the Respondent, by its agents Russ Clapham and Shane McNulty, at its Baymont Inn jobsite in Ypsilanti, Michigan, assisted Plasterers Local 67 in obtaining signed authorization cards from its employees at a meeting called and attended by the Respondent.

On about that same date, the Respondent granted recognition and entered into a collective-bargaining agreement with Plasterers Local 67 as the exclusive collective-bargaining representative of the following employees (the unit):

All journeymen and apprentice plasterers employed by Respondent; but excluding guards and supervisors as defined in the Act.

The Respondent granted recognition to Plasterers Local 67 and entered into a collective-bargaining agreement with it even though a valid petition had been filed on

May 17, 2004, in Case 7-RC-22731 by Bricklayers Local 9 seeking an election among the unit employees.

The collective-bargaining agreement between the Respondent and Plasterers Local 67, at article I, section 2, provides in part:

All employees who are members of the Union on the effective date of this Agreement shall be required to remain members of the Union as a condition of employment during the term of this Agreement. New employees shall be required to become and remain members of the Union, as a condition of employment, from and after the 8th day following the date of their employment or the 8th day following the effective date of this Agreement whichever is later.

The Respondent entered into the collective-bargaining agreement with Plasterers Local 67, which contains the union-security provision set forth above, even though Plasterers Local 67 was not the lawfully recognized collective-bargaining representative of the unit.

Since about June 2004, the Respondent has deducted union dues and fringe benefit contributions from unit employees' wages pursuant to the collective-bargaining agreement and the union-security provision described above.

By entering into the collective-bargaining agreement containing the aforementioned union-security provision and deducting union dues and fringe benefit contributions from employees' wages, even though Plasterers Local 67 was not the lawfully recognized collective-bargaining representative of the unit, the Respondent has encouraged its employees to join Plasterers Local 67.

CONCLUSIONS OF LAW

1. By assisting Plasterers Local 67 in obtaining signed authorization cards from its employees and granting recognition to, and entering into a collective-bargaining agreement with, Plasterers Local 67, even though Bricklayers Local 9 had filed a valid petition seeking an election among the unit employees, the Respondent has violated Section 8(a)(1) and (2) of the Act.

2. By entering into a collective-bargaining agreement that contains a provision requiring employees to remain or become members of Plasterers Local 67 as a condition of employment, and by deducting union dues and fringe benefit contributions from employees' pay, even though Plasterers Local 67 was not the lawfully recognized collective-bargaining representative of the employees, the Respondent has discriminated in regard to the hire or tenure or terms and conditions of employment of its employees, thereby encouraging membership in a labor organization, in violation of Section 8(a)(1) and (3) of the Act.

3. The Respondent's unfair labor practices affect commerce within the meaning of Sections 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has unlawfully assisted, recognized, and entered into a collective-bargaining agreement with Plasterers Local 67, we shall order the Respondent to withdraw and withhold all recognition from Plasterers Local 67 as the collective-bargaining representative of the Respondent's unit employees, unless and until Plasterers Local 67 has been certified by the Board as the exclusive bargaining representative of those employees in an appropriate bargaining unit. In addition, we shall order the Respondent to cease giving effect to the collective-bargaining agreement that it reached with Plasterers Local 67 on about May 27, 2004.

Further, having found that the Respondent has unlawfully deducted union dues and fringe benefit contributions from Isidoro Apreza, John Heath, Jeffrey Jackson, Jesse Jackson, Roger Lawrence, and Dennis Young pursuant to the collective-bargaining agreement with Plasterers Local 67, we shall order the Respondent to reimburse them for the dues and contributions withheld from their pay, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In this regard, the Respondent agreed in the settlement agreement that it would pay the six employees various amounts totaling \$1,309.01.¹ Further, the General Counsel's motion specifically requests that the Board issue an order requiring the Respondent to pay this amount to the six employees named above. Accordingly, the Respondent shall remit \$1,309.01 to the Region for payment to the six employees, plus interest.

In addition, we shall require the Respondent to post a notice to employees.

ORDER

The National Labor Relations Board orders that the Respondent, McNulty Plastering, Inc., North Vernon, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Assisting Local 67, Operative Plasterers & Cement Masons International Union, AFL-CIO, or any other labor organization, in obtaining signed authorization cards from its employees.

(b) Recognizing and entering into a collective-bargaining agreement with Local 67, Operative Plasterers & Cement Masons International Union, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the following unit, unless and until that Union is certified by the National Labor Relations Board as the

exclusive bargaining representative of those employees. The unit is:

All journeymen and apprentice plasterers employed by Respondent; but excluding guards and supervisors as defined in the Act.

(c) Giving effect to a collective-bargaining agreement with Local 67, Operative Plasterers & Cement Masons International Union, AFL-CIO, and requiring employees to become or remain members of that Union as a condition of employment, when Local 67 is not the lawfully recognized collective-bargaining representative of the unit employees; provided, however, that nothing in this Order shall require the Respondent to rescind any improvements made in the employees' terms and conditions of employment pursuant to the collective-bargaining agreement.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold all recognition from Local 67, Operative Plasterers & Cement Masons International Union, AFL-CIO, as the collective-bargaining representative of the unit employees, unless and until Local 67 has been certified by the National Labor Relations Board as the exclusive representative of those employees in an appropriate bargaining unit.

(b) Reimburse Isidoro Apreza, John Heath, Jeffrey Jackson, Jesse Jackson, Roger Lawrence, and Dennis Young for union dues and fringe benefit contributions unlawfully deducted from their pay by remitting to Region 7 \$1,309.01, plus interest, in accordance with the settlement agreement approved by the Regional Director on August 31, 2004, and the remedy section of this decision.

(c) Within 14 days after service by the Region, post at its facility in North Vernon, Indiana, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall

¹ The settlement agreement provided that the Respondent would pay Apreza \$348.60; Heath \$205.80; Jeffrey Jackson \$149.80; Jesse Jackson \$235.20; Lawrence \$142.80; and Young \$226.81.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 27, 2004.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 12, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted By Order of the

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Feral Labor Law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT assist Local 67, Operative Plasterers & Cement Masons International Union, AFL-CIO, or any other labor organization, in obtaining signed authorization cards from our employees.

WE WILL NOT recognize and enter into a collective-bargaining agreement with Local 67, Operative Plasterers & Cement Masons International Union, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the following unit, unless and until that Union is certified by the National Labor Relations Board as the exclusive collective-bargaining representative of those employees. The unit is:

All journeymen and apprentice plasterers employed by us; but excluding guards and supervisors as defined in the Act.

WE WILL NOT give effect to a collective-bargaining agreement with Local 67, Operative Plasterers & Cement Masons International Union, AFL-CIO, and require employees to become or remain members of that Union as a condition of employment, when Local 67 is not the lawfully recognized collective-bargaining representative of the unit employees; provided, however, that we are not required to rescind any improvements made in the employees' terms and conditions of employment pursuant to the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw and withhold all recognition from Local 67, Operative Plasterers & Cement Masons International Union, AFL-CIO, as the collective-bargaining representative of the unit employees, unless and until Local 67 has been certified by the National Labor Relations Board as the exclusive representative of those employees in an appropriate bargaining unit.

WE WILL reimburse Isidoro Apreza, John Heath, Jeffrey Jackson, Jesse Jackson, Roger Lawrence, and Dennis Young for union dues and fringe benefit contributions unlawfully deducted from their pay by remitting to Region 7 \$1,309.01, plus interest, in accordance with the settlement agreement approved by the Regional Director on August 31, 2004.

MCNULTY PLASTERING, INC.